

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANETA KAMILA SZARA,
Petitioner.

No. 2 CA-CR 2015-0083-PR
Filed April 3, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County

No. CR2010102401003DT

The Honorable Jeffrey Rueter, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Karen Kemper, Deputy County Attorney, Phoenix
Counsel for Respondent

Ballecer & Segal, LLP, Phoenix
By Natalee Segal
Counsel for Petitioner

STATE v. SZARA
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Petitioner Aneta Szara seeks review of the trial court’s order denying her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Szara has not sustained her burden of establishing such abuse here.

¶2 Pursuant to a plea agreement entered in January 2010, Szara, a citizen of Poland and lawful permanent resident of the United States since the age of three, was convicted of theft. The trial court suspended the imposition of sentence and placed her on an eighteen-month term of probation. She violated the conditions of her probation later that year and was returned to probation. The state filed a second petition to revoke her probation in July 2011, alleging she had violated several terms of her probation. At a violation hearing in October 2011, Szara rejected probation and the court sentenced her to a one-year term of imprisonment.

¶3 In April and November 2012, Szara filed motions to modify her sentence, asking that the sentence be shortened to something less than one year, in order to attempt to avoid deportation as a result of her conviction and imprisonment. The trial court denied the motions.¹ Thereafter, in January 2013, Szara

¹Both of these motions were filed after the sixty-day deadline to file a motion to modify sentence set forth in Rule 24.3, Ariz. R. Crim. P. The first motion requested that the trial court amend the sentence nunc pro tunc, but such a change would not have been a

STATE v. SZARA
Decision of the Court

initiated a proceeding for post-conviction relief. In her notice, Szara indicated she was without fault in the failure to timely file a notice of post-conviction relief and argued *Padilla v. Kentucky*, 559 U.S. 356 (2010), was a significant change in the law entitling her to relief based on counsel's failing to properly advise her of the immigration consequences of rejecting probation and accepting a prison sentence.

¶4 The trial court appointed counsel, who filed a petition on her behalf, arguing *Padilla* entitled her to relief because her counsel at the revocation hearing had failed to advise her of the negative immigration consequences of accepting a one-year term of imprisonment and rejecting probation. Counsel did not, however, argue that any exception to the rules of preclusion or timeliness applied. Indeed, in Szara's reply to the state's response, counsel argued that Szara's notice was of right, and, without explanation or support, that it was timely, despite its being filed more than a year after Szara was informed she was subject to automatic deportation as a result of her decision to reject probation. *See* Ariz. R. Crim. P. 32.4(a). The court summarily denied relief on the petition, stating only that Szara had "failed to establish a colorable claim for Post-Conviction Relief."

¶5 On review Szara contends the trial court erred in denying her petition. She again maintains counsel was "ineffective for either advising [her] to reject probation or failing to inform [her] of the consequences of rejecting probation, instead of taking the state's offer of continued probation" when her rejecting probation "subjected [her] to automatic removal" and continued probation would not. She contends *Padilla* entitles her to relief and the court should have granted her an evidentiary hearing.

"clerical mistake" under Rule 24.4 because, as noted above, the court had in fact imposed the one-year sentence at the hearing. The second suggested a claim of ineffective assistance of counsel based on *Padilla v. Kentucky*, 559 U.S. 356 (2010), yet neither of the Deputy Maricopa County Public Defenders who represented Szara during the period from the revocation hearing through the filing of the second motion filed a notice of post-conviction relief on her behalf.

STATE v. SZARA
Decision of the Court

¶6 In *Padilla*, the Supreme Court concluded defense counsel is obliged to advise a defendant of the immigration consequences of a guilty plea and failure to do so constitutes “deficient performance under the standard set forth in” *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Poblete*, 227 Ariz. 537, ¶ 9, 260 P.3d 1102, 1105 (App. 2011). And this court has stated “a probationer facing revocation is entitled to counsel.” *State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973). However, although a claim of ineffective assistance of counsel during a probation revocation proceeding may be raised in a Rule 32 proceeding, *State v. Robbins*, 166 Ariz. 531, 533, 803 P.2d 942, 944 (App. 1991), it is a claim pursuant to Rule 32.1(a) and therefore may not be raised in an untimely proceeding, *see* Ariz. R. Crim. P. 32.4(a).

¶7 Szara’s notice of post-conviction relief asserted a claim pursuant to Rule 32.1(f), which may be raised in an untimely proceeding. Indeed, the same attorney who represented her at the probation revocation hearing acknowledged directly and through another attorney in the same firm that he had failed to properly advise her of the immigration consequences in rejecting probation, and failed to advocate to the trial court for a sentence less than one year to avoid automatic deportation. But any such claim was abandoned in the trial court and on review, and we therefore cannot now address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain “reasons why the petition should be granted”); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider issues not presented to or ruled on by trial court). And even were we to address the claim, there is no explanation in the record for the failure to file a timely notice after learning in April 2012 that she was subject to deportation because of the term of her sentence.

¶8 For these reasons, although we grant the petition for review, we deny relief.